Supreme Court, U.S.
FILED
MAR 5 1994
OFFICE OF THE CLERK

No. 92-1920

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

KAREN LIVADAS,
Petitioner,
v.
LLOYD AUBRY, LABOR COMMISSIONER FOR THE STATE OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

MARK SCHNEIDER
9000 Machinists Place
Upper Marlboro, Maryland 20772

MARSHA S. BERZON
177 Post Street, Suite 300
San Francisco, California 94108

LAURENCE GOLD
(Counsel of Record)
WALTER KAMIAT
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

CORRECTED COPY

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
SUMMARY OF ARGUMENT	1
ARGUMENT	3
I. FEDERAL LABOR POLICY DOES NOT REQUIRE STATES TO EXCLUDE UNIONIZED WORKERS FROM THE PROTECTIONS OF THEIR MINIMUM STANDARD EMPLOYMENT LAWS	3
II. SECTION 229 AS APPLIED BY THE LABOR COMMISSIONER IS PREEMPTED BY THE NATIONAL LABOR RELATIONS ACT	25
CONCLUSION	30

TABLE OF AUTHORITIES

CASES

	Page
Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974)	20-21
Allis-Chalmers v. Lueck, 471 U.S. 202 (1985)	*passim*
Atchinson T. & S.F. R. Co. v. Bvell, 480 U.S. 557 (1987)	17
Babler Brothers, Inc. v. Roberts, 995 F.2d 911 (9th Cir. 1993)	29
Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728 (1981)	5, 17
Belknap v. Hale, 463 U.S. 491 (1983)	27
Brown & Southwestern Bell Telephone Co., 901 F.2d 1250 (5th Cir. 1990)	14
Building and Construction Trades Council v. Associated Builders and Contractors, 61 U.S.L.W. 4221 (1993)	26
Caterpillar, Inc. v. Williams, 482 U.S. 386 (1987)	9, 11, 17
Collyer Insulated Wire, 192 NLRB 837 (1971)	24
Connell Construction Co. v. Plumbers, 421 U.S. 616 (1975)	22, 23
Corning Glass Works v. Brennan, 417 U.S. 188 (1974)	22
Darr v. NLRB, 801 F.2d 1404 (D.C. Cir. 1986)	20
Dowd Box v. Courtney, 368 U.S. 502 (1962)	19
Electrical Workers v. Hechler, 481 U.S. 851 (1987)	9, 11
England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964)	25
Fort Halifax Packing Co. v. Coyne, 479 U.S. 1052 (1987)	28
Franchise Tax Board v. Laborers Vacation Trust, 463 U.S. 1 (1983)	10
Galvez v. Kuhn, 933 F.2d 773 (9th Cir. 1991)	15
Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647 (1992)	21
Golden State Transit Corp. v. Los Angeles, 475 U.S. 608 (1986)	28
Goodman v. Lukens Steel Co., 482 U.S. 656 (1987)	22
Hanks v. General Motors Corp., 906 F.2d 341 (8th Cir. 1990)	14

TABLE OF AUTHORITIES—Continued

	Page
Hillsborough Tp. v. Cromwell, 326 U.S. 620 (1946)	24
Jackson v. Conrail, 717 F.2d 1045 (7th Cir. 1983)	24
Jackson v. Liquid Carbonic Corp., 863 F.2d 111 (1st Cir. 1988)	13
Johnson v. Anheuser Busch, Inc., 876 F.2d 620 (8th Cir. 1989)	13, 14
Johnson v. Beatrice Foods Co., 921 F.2d 1015 (10th Cir. 1990)	13, 14
Kaiser Steel v. Mullins, 455 U.S. 72 (1982)	23
Krashna v. Oliver Realty, Inc., 895 F.2d 11 (3rd Cir. 1990)	14
Laws v. Calmat, 852 F.2d 430 (9th Cir. 1988)	13
Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399 (1988)	*passim*
Machinists v. Wisconsin Employment Relations Commission, 427 U.S. 132 (1976)	26
Magerer v. John Sexton & Co., 912 F.2d 525 (1st Cir. 1990)	13
McCormick v. AT&T Technologies, Inc., 934 F.2d 531 (1991), *cert. denied*, 112 S. Ct. 912 (1992)	14
McCulloch v. Maryland, 4 Wheat. 316 (1819)	26
Metropolitan Life Insurance Co. v. Massachusetts, 471 U.S. 724 (1985)	*passim*
Mineworkers v. Pennington, 381 U.S. 657 (1965)	8
Nash v. Florida Industrial Commission, 389 U.S. 235 (1967)	26
Operating Engineers v. Wilson, 915 F.2d 535 (9th Cir. 1990), *cert. denied*, 112 S.Ct. 3013 (1991)	13
O'Shea v. Detroit News, 887 F.2d 683 (6th Cir. 1989)	14
Pennsylvania Federation of BMWE v. National Railroad Passenger Corp., 989 F.2d 112 (3rd Cir. 1993)	13
Railroad Commissioner v. Pullman, 312 U.S. 496 (1941)	24
Republic Steel Corp. v. Maddox, 379 U.S. 335 (1965)	20

TABLE OF AUTHORITIES—Continued

	Page
San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959)	22, 26
Schlacter-Jones v. General Telephone, 936 F.2d 435 (9th Cir. 1991)	13
Smith v. Evening News Association, 371 U.S. 195 (1962)	23
Steelworkers v. Enterprise Wheel & Carriage Corp., 363 U.S. 593 (1960)	19
Steelworkers v. American Manufacturing Co., 363 U.S. 564 (1960)	19
Steelworkers v. Rawson, —— U.S. ——, 110 S. Ct. 1904 (1990)	9, 11, 18
Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960)	19
Strikes v. Chevron USA, Inc., 914 F.2d 1265 (9th Cir. 1990)	13
Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962)	5, 18
Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957)	4, 5
Trans World Airlines v. Hardison, 432 U.S. 63 (1977)	22
United Technologies, 268 NLRB 557 (1984)	24
Utility Workers v. Southern California Edison, 852 F.2d 1083 (9th Cir. 1988)	13
Weber v. Anheuser-Busch, 348 U.S. 468 (1955)	29
STATUTORY MATERIALS	
Cal. Code § 229	*passim*
Equal Pay Act, 29 U.S.C. § 206	22
Federal Arbitration Act, 9 U.S.C. § 2	19, 21
Labor Management Relations Act, § 301, 29 U.S.C. § 135	*passim*
National Labor Relations Act, as amended, 29 U.S.C. § 141, *et seq.* § 7, 29 U.S.C. § 157	*passim*
MISCELLANEOUS	
Note, the Need for a New Approach to Federal Preemption of Union Members' State Law Claims, 99 Yale L.J. 209 (1989)	14-15
Restatement (Second) of Contracts, § 178	8

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

No. 92-1920

KAREN LIVADAS,
Petitioner,
v.
LLOYD AUBRY, LABOR COMMISSIONER FOR THE STATE OF CALIFORNIA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

This brief *amicus curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), a federation of 86 national and international labor organizations with a total membership of approximately 14,000,000 working men and women, with the consent of the parties, as provided for in the Rules of the Court.

SUMMARY OF ARGUMENT

In Part I of this brief we consider respondent's understanding that it would be inconsistent with federal labor policy to extend the coverage of state wage laws to employees covered by labor agreements with arbitration clauses. We show that this Court has held that protecting

employees in modern industrial society through state minimum labor standard laws is not contrary to, but, instead, the base upon which the federal collective bargaining laws rest. Thus, the states, like the federal government, may establish public law minimum substantive protections for all employees, including employees covered by collective bargaining agreements.

We then demonstrate that no policy inherent in § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, suggests any different result. That provision was intended to assure that agreements secured through collective bargaining would be enforceable through a uniform body of federal law. Nothing in that law, or in this Court's previous decisions that consider its preemptive force, supports the view that the need for uniform enforcement of labor agreements requires the wholesale eradication of state law claims whenever resolution of those claims requires reference to the terms of a labor agreement. Neither the federal policy requiring uniformity in interpreting labor agreements, nor the policy favoring arbitration of workplace disputes under collectively bargained arbitration schemes supports respondent's position.

In Part II we discuss the inverse of the proposition analyzed in Part I: whether a law whose effect is to deprive unionized workers of the benefits of state minimum standards laws—far from being *required* by federal labor policy—so burdens the functioning of the federal scheme as to be in conflict with that scheme. We demonstrate that when a state deprives unionized workers of the benefits of its state minimum labor standards laws on a mistaken view of the incompatibility of the two systems of worker protection, the result of its actions is simply to punish employees who have completed the process of collective bargaining. For that reason, a law like Cal. Code § 229 that as applied effectively deprives most unionized workers the benefit of the state wage laws impermissibly burdens the federal scheme.

ARGUMENT

I. FEDERAL LABOR POLICY DOES NOT REQUIRE STATES TO EXCLUDE UNIONIZED WORKERS FROM THE PROTECTIONS OF THEIR MINIMUM STANDARD EMPLOYMENT LAWS.

California for many years has had in place wage laws that require, among other things, that employees be paid at specified intervals and in a specified manner. Such laws are the norm in state labor codes. Virtually every state has made the judgment that employees, especially employees with limited income, are dependent upon regular wage payments to meet their basic human needs. The resulting statutory provisions are a basic component in our system for regulating employment, a paradigm example of a public law minimum substantive protection for individual employees.[1]

Respondent nevertheless argues that § 301 of the LMRA preempts the application of such state wage laws to employees covered by a collective bargaining agreement with an arbitration clause, because the remedy provided in the law requires in every case calculation of the wage due, which in turn requires "application of a collective bargaining agreement." Pet. App. 26a, citing Cal. Code § 229. Virtually all state wage laws—indeed virtually all state employment laws of any kind that provide the standard remedy of backpay—require a similar calculation. If respondent is correct as to the preemptive scope of LMRA § 301, most state wage laws as applied to unionized workers would be preempted.

The AFL-CIO is the last organization to minimize the benefits of collective bargaining and the efficacy of labor contract arbitration, or to oppose preemption doctrines necessary to ensure the effective operation of the collective bargaining system instituted by the National Labor

---

[1] *See* Bureau of National Affairs, Labor Relations Reporter, State Laws, summarizing the regulations of the 48 states that have adopted such provisions.

Relations Act of 1935 ("NLRA"), as amended in 1947 by the LMRA. We nevertheless think it clear that respondent's view of the preemptive force of federal labor law in this area rests upon a fundamental misunderstanding of that law.

A. It facilitates analysis to begin by fixing LMRA § 301's place within the overall NLRA-LMRA statutory scheme of which it is a single piece. These federal enactments protect the right of employees "to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection." NLRA § 7, 29 U.S.C. § 157. Where employees choose to exercise that right by selecting an exclusive bargaining representative, NLRA §§ 8(a)(5), 8(b)(3) & 8(d) require the employer and the employee representative to bargain in good faith over wages and other terms and conditions of employment, and LMRA § 204(a)(i) enjoins the parties to "exert every reasonable effort to make and maintain [collective bargaining] agreements." *See* 29 U.S.C. §§ 158(a)(5), (b)(3), (d) & 174(a)(i).

LMRA § 301, in its turn, dictates that where collective bargaining results in an agreement, that agreement shall be enforceable in the federal courts:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties . . . . [29 U.S.C. § 185(a).]

Moreover, as this Court explained in *Allis-Chalmers v. Lueck*, 471 U.S. 202, 209 (1985),

> [i]n *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), the Court ruled that § 301 expresses a federal policy that the substantive law to apply in § 301 cases "is federal law, which the courts must fashion from the policy of our national labor laws." *Id.* at 456. That seminal case understood § 301 as a congressional mandate to the federal courts to fashion a body of federal common law to be used to address disputes arising out of labor contracts.

And, in *Teamsters v. Lucas Flour*, 369 U.S. 95 (1962), the Court resolved the "choice of law" question inherent in *Lincoln Mills* by ruling that these federal common law principles must apply in all breach of labor contract cases, whether brought in state or in federal court. Thus the Court declared federal contract law paramount, and state contract law preempted, when courts are presented with labor contract claims.

The federal labor law, then, is an integrated whole that governs the successive stages of a single process enabling employees to unionize, and employers and employees to bargain collectively and reach binding and enforceable agreements embodying the results of their bargain.

B. This is not the first time that this Court has considered how this federal law of collective bargaining was intended to relate to state minimum labor standards laws. In *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985), the Court considered the claim that the NLRA system of free collective bargaining preempts such state laws. In this regard, the appellants argued that Congress "intended to prevent the states from establishing minimum employment standards that labor and management would otherwise have been required to negotiate from their federally protected bargaining position." *Id.* at 751. The *Metropolitan Life* Court unanimously rejected that argument. In so doing, the Court emphasized four propositions critical to the instant case.

First, regulation of the employment relationship, in the form of public law minimum labor standards embodied in countless legislative enactments at both the federal and state levels, dates back a hundred years. Such enactments

include, for example, "[c]hild labor laws, minimum and other wage laws, laws affecting occupational health and safety, . . . [s]tate laws requiring that employers contribute to unemployment and workmen's compensation funds, laws prescribing mandatory state holidays, and those dictating payments to employees for time spent at the polls or on jury duty." 471 U.S. at 756 (internal quotations omitted).

Second, both federal and state minimum labor standard laws have governed "union and nonunion employees equally," 471 U.S. at 755, and have done so by establishing public law norms that operate "independent of the collective-bargaining process," and that "devolve on [employees] as individual workers, not as members of a collective organization," *id.* (*quoting Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 745 (1981)).

Third, Congress "developed the framework for self-organization and collective bargaining of the NLRA within th[is] larger body of state law promoting public health and safety" and did not "intend[] to disturb the myriad state laws then in existence that set minimum labor standards, but were unrelated in any way to the processes of bargaining or self-organization." 471 U.S. at 756. Accordingly, Congress conceived of the collective bargaining system as one that enables workers, through collective action, to enhance their employment conditions, above minimum public law standards. "No incompatibility exists, therefore, between federal rules designed to [protect collective bargaining] and state or federal legislation that imposes minimal substantive requirements on contract terms negotiated between parties to labor agreements, at least as long as the purpose of the state legislation is not incompatible with the[] general goals of the NLRA." *Id.* at 754-756. Indeed, Congress has reaffirmed this judgment repeatedly over the years, as Congress "has . . . [n]ever seen fit to exclude unionized workers and employers from laws establishing federal minimal employment standards." *Id.* at 755. And, the Court has

noted that there is "no reason to believe that for this purpose Congress intended state minimum labor standards to be treated differently from minimum federal standards." *Id.*

Finally, the Court noted that the federal collective bargaining scheme would be endangered if individual workers were to be denied state minimum labor standards protections should those workers choose to unionize and engage in collective bargaining: "It would turn the policy that animated the Wagner Act on its head to . . . penalize[] workers who have chosen to join a union by preventing them from benefiting from state labor regulations imposing minimal standards on nonunion employees." 471 U.S. at 756.

C. *Metropolitan Life* settles the proposition that the federal labor laws do *not* preempt state minimum labor standards laws during the organizing process governed by NLRA-LMRA scheme or during the collective bargaining process, also governed by that scheme. The remaining question—and the one presented here—is whether once collective bargaining negotiations result in an agreement, the mechanism for the enforcement of the agreement—LMRA § 301—requires the very same laws to give way. The logic of the situation all but compels the conclusion that the answer is "No."

First, as we have noted, the *Metropolitan Life* Court, after canvassing the NLRA-LMRA legislative materials, concluded that Congress developed the federal labor laws "within the larger body of state law promoting health and safety" and did not by enacting the federal labor laws "intend to disturb the myriad state laws then in existence that set minimum labor standards." 471 U.S. at 756.

Nothing in the LMRA § 301 legislative materials shows a different intent. So far as we can find, there is not a word in § 301 or in the reports and floor statements pertaining to that provision so much as suggesting that the federal law of labor contracts would displace state minimum labor standards laws. That parallel is precisely

what one would expect; § 301, after all, is not a free-standing provision animated by a set of purposes and concerns separate from those that animate the NLRA-LMRA scheme as a whole, but an integral part of that scheme.

Second, LMRA § 301's particular office in the federal labor law is not one that supports, much less requires, the preemption of state minimum labor standards laws. The point of § 301 is to make collective bargaining agreements *enforceable.* The means to that end is a grant of jurisdiction to the federal courts over suits for violation of such agreements, and a charge to develop a *uniform federal labor contract law* to govern such suits.

No principles of law are better settled than that private agreements are negotiated against the background of the applicable public law and that such private agreements are supplemental or subordinate to, not paramount over, public law. *E.g., Mineworkers v. Pennington,* 381 U.S. 657, 665 (1965) (because unions have a right to "bargain does not mean that the agreement reached may disregard other laws"). *See generally,* Restatement (Second) of Contracts, § 178, comment a (a "court is bound to carry out the legislative mandate with respect to the enforceability of [any] contract term"). Indeed, this Court has already ruled that § 301 conforms to these principles: "Clearly, § 301 does not grant the parties to a collective bargaining agreement the ability to contract for what is illegal under state law." *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202, 212 (1985).

Given these principles, and *Metropolitan Life*'s recognition that the federal law governing the negotiation of collective bargaining agreements does *not* preempt state minimum standard laws, it is all but inconceivable that the federal law governing the enforcement of the resulting collective bargaining agreements would have that more far-reaching preemptive effect.[2]

[2] The *Metropolitan Life* Court was well aware of the § 301 preemption issue. That case was decided later in the same term the Court decided the seminal § 301 preemption case, *Allis-Chalmers Mfg. Co. v. Lueck, supra.* Indeed, *Metropolitan Life* cited the *Lueck* decision for the proposition that federal law could not be understood to have sanctioned penalizing workers who choose to join a union by depriving them of the benefits of state minimum labor standard laws. 471 U.S. at 756.

D. Four times in recent years, the Court has confronted the question presented here: when does the § 301 federal common law of labor contracts preclude state causes of action from going forward where the plaintiff is an employee covered by a collective bargaining agreement. *Allis-Chalmers Corp. v. Lueck, supra, Electrical Workers v. Hechler,* 481 U.S. 851 (1987); *Caterpillar, Inc. v. Williams,* 482 U.S. 386 (1987); *Lingle v. Norge Division of Magic Chef, Inc.,* 486 U.S. 399 (1988). *See also Steelworkers v. Rawson,* —— U.S. ——, 110 S.Ct. 1904 (1990). None of these cases, fairly understood, support respondent's view of § 301 preemption.

In *Allis-Chalmers, supra,* the Court for the first time considered the preemptive force of § 301 in a case that was not styled as a suit to enforce a labor agreement. In that case, the plaintiff, an employee covered by a collective bargaining agreement, brought what he labelled a state tort action for breach of the duty of good faith in failing to honor an insurance provision in the agreement. Analyzing the state law, the Court determined that in substance the state tort was nothing more than a breach of contract claim pleaded in tort. Had the matter been pleaded as a breach of contract, the plaintiff would have been required to arbitrate the claim pursuant to the contract's arbitration clause, and—had a breach been established—would have been awarded contractual damages. By pleading the claim as a tort, plaintiff sought to avoid the arbitral process and the limited contract damages that would have otherwise applied.

To have allowed such a result, the Court concluded, "would elevate form over substance and allow parties to evade the requirements of § 301 by re-labeling their con-

tract claims as claims for tortious breach of contract." 471 U.S. at 211. *See also Franchise Tax Board v. Laborers Vacation Trust*, 463 U.S. 1, 22-23 (1983). As the *Allis-Chalmers* Court explained, "questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement must be resolved by reference to uniform federal law." 471 U.S. at 211.

Lest it be misinterpreted as having uncovered some more expansive preemptive intent in § 301, the Court also added:

> Of course, not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is preempted by § 301. . . . In extending § 301 beyond suits for breach of contract, it would be inconsistent with congressional intent under that section to preempt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract. [471 U.S. at 212.]

This Court's subsequent decisions reiterate the same principle: Section 301 preemption is designed to assure that if the parties to collective bargaining negotiate for certain *contract rights*, and as well negotiate for arbitration of claims arising out of those bargained-for-rights, they will be assured the benefit of their collective bargain through application of a uniform body of federal law. A state law claim, whatever its label, that states in substance that the defendant denied the plaintiff a *contract right*, does nothing more than give force to a private contractual agreement. Such a law is not a law "independent of a labor contract," but in substance a contract law that § 301 preempts.

At the same time, *Allis-Chalmers* and its progeny confirm that nothing in § 301 draws into questions state laws that *are* independent of the labor agreement; *viz.*, laws that grant employees a *public law right* and employers a corresponding public law obligation—whether or not

the employee is covered by a collective bargaining agreement. An employee filing a claim under such a state law makes out his substantive case without having to show that the employer breached a collective bargaining agreement, or any other private agreement. And, such an agreement comes into play only to provide a subsidiary fact (for example, in this wage case, the time at which wages were to be paid or the amount of the wages) or if the employer-defendant so chooses as a defense. Such tangential references to a labor contract cannot be said to change the independent nature of the state minimum labor standards law or of the employee's claim founded on that law. *See, e.g., Hechler*, 481 U.S. at 859 (§ 301 preemption turns upon whether the state law duty relied upon "was one without existence independent of the collective-bargaining agreement"); *Caterpillar*, 482 U.S. at 395 ("a plaintiff covered by a collective bargaining agreement is permitted to assert [in state court] legal rights *independent* of that agreement") (emphasis in original). *See also, Rawson*, 110 S. Ct. at 1911 ("questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law") (citing *Allis-Chalmers*); *id.* at 1915 (Kennedy, J., dissenting) (agreeing that "a State cannot circumvent our decisions in *Lingle*, *Hechler*, and *Allis-Chalmers*, by the mere 'relabeling' as a tort claim an action that in law is based upon the collective bargaining process").

E. To be sure, as the decision below shows, the lower courts have tended to read this Court's § 301 preemption decisions—and most particularly the *Lingle* decision—as standing for a different and broader principle. That principle is that when employees covered by a collective bargaining agreement (or, as in the instant case, an agreement with an arbitration clause) assert a claim based upon what is alleged to be a state minimum labor standards public law right, to determine whether the claim is pre-

empted, the court looks, not to the independence of the state *public law right* asserted from any *labor contract right,* but instead to whether resolution of the claim that rests on the public right entails some specified quantum of contract interpretation. On this theory, if resolution of the employee's minimum labor standards law claim entails more than that quantum of contract interpretation, the claim is preempted, without regard to whether the *public law right* asserted is independent of any contract right, or is instead, in essence, a contract right.

The quantum of contract interpretation said to trigger § 301 preemption varies wildly. In its most modest form, a state minimum labor standards law claim is said to be not preempted unless the validity of the claim turns on the contract interpretation question. At the other extreme, such a claim is said to be preempted whenever a *defendant* asserts as an affirmative defense that there is a contractual justification for its action, regardless of the merits of that defense. In its most modest formulation, then, the same state law claim may be preempted or not depending on the facts that are in dispute in a particular suit brought under the state law. In its strongest form, as in the instant case, § 301 is said to require preemption of state minimum labor standards law claims when a question turning on the labor contract is present even though there is no dispute over the contract's meaning. But in all of its forms, the "quantum of contract interpretation" test looks to whether contract interpretation questions are at least conceivably present in cases brought under the state minimum labor standards law, rather than to whether the state law is a "contract" law, *viz.*, a law concerned with the enforcement of private contract rights.

At the least, these decisions require unionized employees to pursue remedies through labor arbitration under analogous provisions in their collective bargaining agreement. But, as in this case, the doctrine typically has a far greater substantive effect. Labor contracts do not necessarily include provisions that create contract rights analo-

gous to rights provided by state minimum labor standard laws. And, as we discuss in more detail, *infra,* labor contract arbitration is typically limited to resolution of contract claims, and is not intended by the contracting parties to be a vehicle to resolve claims derived from other sources of law.

Thus, as we noted at the outset, in most cases the "quantum of contract interpretation" approach has the practical effect of depriving unionized employees of the protection of a wide variety of substantive state public law rights of general applicability that do *not* derive from any private contractual agreement [3]—*e.g.*, rights of privacy,[4] rights against wrongful discharge,[5] rights against retaliatory discharge,[6] rights against defamation,[7] and, as here, rights derived from wage laws.[8]

The courts of appeals, for example, are now split on whether state intentional infliction of emotional distress claims should be preempted when the alleged invasion took place in a unionized workplace, if the employer

---

[3] While by far the greatest danger of "contract interpretation" preemption is that it preempts claims that should not be preempted, we observe as well that the doctrine is also underinclusive. For example, at least one court has found not preempted a state law fraud claim based upon the fraudulent negotiation of a labor agreement, reasoning that it need not interpret the labor agreement to resolve the case under state law. *See Operating Engineers v. Wilson,* 915 F.2d 535 (9th Cir. 1990), *cert. denied,* 112 S.Ct. 3013 (1991).

[4] *Jackson v. Liquid Carbonic Corp.,* 863 F.2d 111 (1st Cir. 1988); *Schlacter-Jones v. General Telephone,* 936 F.2d 435 (9th Cir. 1991); *Strikes v. Chevron USA, Inc.,* 914 F.2d 1265 (9th Cir. 1990); *Utility Workers v. Southern California Edison,* 852 F.2d 1083, 1086-87 (9th Cir. 1988); *Laws v. Calmat,* 852 F.2d 430 (9th Cir. 1988).

[5] *Johnson v. Anheuser Busch, Inc.,* 876 F.2d 620 (8th Cir. 1989).

[6] *Magerer v. John Sexton & Co.,* 912 F.2d 525 (1st Cir. 1990).

[7] *Johnson v. Anseuser Busch, Inc., supra.*

[8] *Pennsylvania Federation of BMWE v. National R.R. Passenger Corp.,* 989 F.2d 112 (3rd Cir. 1993).

defendant asserts as an affirmative defense that its conduct can arguably be justified by the "management rights" clause of the labor agreement. In finding such a claim to be preempted on this rationale, the Fourth Circuit majority in *McCormick v. AT&T Technologies, Inc.*, 934 F.2d 531 (1991) (*en banc*), *cert. denied*, 112 S. Ct. 912 (1992), did not feel the need to consider whether the management rights clause did in fact justify the conduct, whether, if the clause did so, the state law protection could in any event be negated through negotiation of such a clause, or whether the state law protection is, in fact, waived. Instead, invocation of the collective bargaining agreement in the defense was, *without more*, enough to deprive unionized workers the protections of Virginia's tort law, on the theory that § 301 mandated such a result.[9]

The litigating elucidation of the "quantum of contract interpretation" standard has served to demonstrate that it is so contrary to normal contract concepts, so devoid of any basis in federal labor policy, and so evanescent in its formulation that it cannot be held in the mind. The lower court decisions relying upon this test have resulted in a set of *ad hoc* decisions that purport to accommodate both the "quantum of contract interpretation" test and an exception for "incidental" contract interpretation that are in hopeless conflict.[10]

---

[9] *Accord, Brown & Southwestern Bell Telephone Co.*, 901 F.2d 1250, 1256 (5th Cir. 1990); *Johnson v. Beatrice Foods Co.*, 921 F.2d 1015 (10th Cir. 1990); *Johnson v. Anheuser Busch, Inc., supra*, 876 F.2d 620 (8th Cir. 1989). *Contra, Krashna v. Oliver Realty, Inc.*, 895 F.2d 11 (3rd Cir. 1990); *O'Shea v. Detroit News*, 887 F.2d 683 (6th Cir. 1989); *Hanks v. General Motors Corp.*, 906 F.2d 341 (8th Cir. 1990). *See also McCormick v. AT&T Technologies*, 934 F.2d at 538 (Phillips J., dissenting).

[10] As the Ninth Circuit has observed, LMRA § 301 preemption has become "one of the most confused areas of federal court litigation:"

> [S]ection 301 has been the precipitate of a series of often contradictory decisions, so much so that "federal preemption of state labor law has been one of the most confused areas of federal court litigation." *Note, The Need for a New Approach to Federal Preemption of Union Members' State Law Claims*, 99 Yale L.J. 209 (1989). [*Galvez v. Kuhn*, 933 F.2d 773 (9th Cir. 1991).]

F. We do not believe that this "quantum of contract interpretation" preemption standard is fairly derived from this Court's decisions. As courts applying such a standard typically rely on language from this Court's decision in *Lingle*, we turn to consider the Court's formulation of the § 301 preemption test in that decision.

At the outset, we acknowledge that it is no easy matter to formulate a reasonably succinct rule of law that captures the distinction between a state minimum labor standards law that is independent of a collective bargaining agreement, and a state law that rests on a collective bargaining agreement right. State minimum labor standard laws are typically stated in general terms—that employees shall not work more than a set number of hours, that employees shall not be discriminated against on a stated basis, etc.—while the specifics of the employment relationship are worked out in a set of understandings promulgated unilaterally by the employer in unorganized workplaces, or in a collective bargaining agreement in unionized workplaces. As this case shows, it is all but inevitable that a state minimum labor standards case will require some reference to those concrete understandings. Thus, while the basic distinction here is between "state rules that proscribe conduct or establish rights and obligations independent of a labor contract," *Allis-Chalmers*, 471 U.S. at 212, and state rules that rest on a contract right, the word "independent" cannot mean totally without any relation to any labor contract. Instead, the phrase embodies the concept of a state law that creates a substantive public right that stands on its own, and does not require a claimant in order to prevail to prove a "contract right" or that a defendant-employer breached a contract in any way. As the Court recognized in *Lingle*:

> [A]s a general proposition, a state-law claim may depend for its resolution upon both the interpretation of a collective-bargaining agreement and a separate

> state-law analysis that does not turn on the agreement. In such a case, federal law would govern the interpretation of the agreement, but the separate state-law analysis would not be thereby pre-empted. As we said in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. at 211, "not every dispute . . . tangentially involving a provision of a collective-bargaining agreement, is pre-empted by § 301 . . . ." [471 U.S. at 413, n.12.]

The Court has therefore essayed a number of formulations of the governing § 301 preemption rule which the *Lingle* opinion collects. The *Lingle* Court thus summarized *Allis-Chalmers* as holding "if the resolution of a state-law claim depends upon the meaning of a collective-bargaining agreement, the application of state law (which might lead to inconsistent results since there could be as many state-law principles as there are States) is pre-empted and federal labor-law principles . . . must be employed to resolve the dispute." 486 U.S. at 405-06. And to clarify what kind of "dependence" was at issue, the Court then quoted that portion of the *Allis-Chalmers* decision that analyzed and identified the dependent nature of the state tort claim at issue in that case: "We then analyzed the Wisconsin tort remedy, explaining that it 'exists for a breach of a 'duty devolv[ed] upon the insurer by reasonable implication from the express terms of the contract,' the scope of which, crucially, is 'ascertained from a consideration of the contract itself' " 486 U.S. at 405 (*quoting Allis-Chalmers*, 471 U.S. at 216, *quoting in turn* Wisconsin law).

In a footnote to that passage, *Hechler, supra,* was said to have "applied this same principle of § 301 pre-emption and to have resulted in a judgment that a Florida law was preempted because it was contract based. "Our analysis of Florida law revealed that '[t]he threshold inquiry for determining if a [state tort] cause of action exists is an examination of the contract to ascertain what duties were accepted by each of the parties and the scope of those duties.' " 486 U.S. at 406, n.4.

Later the *Lingle* Court quoted from *Caterpillar Inc., supra,* as follows:

> Section 301 governs claims founded directly on rights created by collective-bargaining agreements, and also claims "substantially dependent on analysis of a collective-bargaining agreement." . . . [C]ontrary to Caterpillar's assertion, . . . respondents' complaint is not substantially dependent upon interpretation of the collective bargaining agreement. It does not rely upon the collective agreement indirectly, nor does it address the relationship between the individual contracts and the collective agreement. As the Court has stated, "it would be inconsistent with congressional intent under [§ 301] to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract." *Allis-Chalmers Corp., supra,* at 212. [486 U.S. at 410, n.10.]

And, finally in this regard, the *Lingle* Court found the following passage from *Atchinson, T. & S.F.R. Co. v. Buell,* 480 U.S. 557, 564-565 (1987), instructive:

> This Court has, on numerous occasions, declined to hold that individual employees are, because of the availability of arbitration, barred from bringing claims under federal statutes. Although the analysis of the question under each statute is quite distinct, the theory running through these cases is that notwithstanding the strong policies encouraging arbitration, "different considerations apply *where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.*" *Barrentine, supra,* [450 U.S.] at 737. [486 U.S. at 411-12 (emphasis in original).]

Lingle sums up all the foregoing by stating that "§ 301 preemption merely ensures that federal law will be the basis for interpreting collective bargaining agreements, and says nothing about the substantive rights a State may provide to workers when adjudication of those rights does *not depend upon* the interpretation of such agreements," 486 U.S. at 409 (emphasis added), and "an application

of state law is preempted by § 301 of the Labor Management Relations Act of 1947 only if such application *requires* the interpretation of a collective-bargaining agreement," *id.* at 413 (emphasis added).

The words used in the various formulations of the § 301 test reviewed with approval in *Lingle* are not uniform, but each points towards a consideration of the plaintiff's *claim* and an analysis of whether that claim is based on a contract right or is instead based upon an independent public law right. Reviewing the decision as a whole, rather than pulling from it phrases about "contract interpretation," the fair conclusion is that the adjudication of a claim "depends" on the interpretation of a collective bargaining agreement or "requires" such an interpretation if, and only if, the right the plaintiff claims is created by a labor contract, rather than by a substantive state public law. The Court's subsequent decision in *Rawson, supra,* supports our understanding of *Lingle. See Rawson,* 110 S.Ct. at 1909. *See also id.* at 1915 (Kennedy, dissenting).

G. The proponents of the "quantum of contract interpretation" preemption test invoke two policy interests that underlie § 301. Neither supports the "contract interpretation" preemption approach.

1. The first of these interests is uniformity, which the Court in *Lucas Flour* identified as perhaps the most important interest furthered by § 301 preemption, necessary to assure that the negotiation and administration of labor agreements are not hampered by confusion about the consequences of agreeing to a contract term.

But as *Lucas Flour* itself made clear, and precisely for the reasons already given with regard to § 301's basic purpose, the uniformity imposed by § 301 is the uniform application of a single body of *federal labor contract principles* to all *breach of contract claims.* There is no basis in § 301, in the case law, or in reason for extending § 301 preemption beyond the enforcement of *contract rights* to the enforcement of public law rights that implicate a labor contract question, regardless of the context

within which the question arises. *See also Dowd Box v. Courtney,* 368 U.S. 502 (1962). So long as federal and state courts as well as arbitrators apply the uniform § 301 federal common law to labor contract question, as *Lucas Flour* requires, there is no danger that the parties will be subject to local and varying law as to the nature of their bargain. And such uniformity is all that any contracting party can rationally expect from a uniform system of *contract law.*

2. The second federal interest said to require "quantum of contract interpretation" preemption is a federal preference for arbitral resolution of labor contract claims. There is, of course, a strong policy favoring the arbitration of labor-management disputes, embodied in LMRA § 203(d) and in the *Steelworkers Trilogy.*[11] This presumption does *not,* we submit, have the force to oust state minimum labor standards laws whenever their enforcement arguably requires contract interpretation.

The federal labor policy favoring arbitration covers disputes concerning the majoritarian decisionmaking process embodied in the collective bargaining agreement. LMRA § 203(d), in terms, prefers contractually-established dispute resolution mechanisms as "the desirable method" only "for the settlement of grievance disputes arising over the application and interpretation of an existing collective bargaining agreement", and not for the settlement of public-law based disputes.[12] And, the *Steelworkers Trilogy* as well stressed that the policy favoring arbitration:

---

[11] *Steelworkers v. Enterprise Wheel & Carriage Corp.,* 363 U.S. 593, 597 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574 (1960); *Steelworkers v. American Mfg. Co.,* 363 U.S. 564 (1960).

[12] The language of the Federal Arbitration Act in contrast is considerably broader. That Act covers controversies "arising out of" either the "contract" or the underlying "transaction," as well as any controversy involving "the refusal to perform the whole or any part thereof [of the contract or transaction]." 9 U.S.C. § 2.

> is confined to interpretation and application of the collective bargaining agreement; . . . [The arbitrator] may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. [*Steelworkers v. Enterprise Wheel, supra,* 363 U.S. at 597.]

Thus, many labor arbitrators see public law claims as beyond their ken, and refuse to adjudicate such claims even when asked to do so by the parties. *See Darr v. NLRB,* 801 F.2d 1404 (D.C. Cir. 1986) (arbitrator "saw the NLRB and the courts as ultimately charged with the enforcement of public rights, and arbitrators as responsible for applying labor agreements to determine private rights", and issued an award that he knew to be contrary to the NLRB but that he believed effectuated the intent of the parties). *See also Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 53 (1974).

The limited scope of the presumption favoring labor arbitration has its roots in the fact that the commitment to arbitrate contained in collective bargaining agreements is made by the group, but is binding upon each of the covered individual employees. *Republic Steel Corp. v. Maddox,* 379 U.S. 335 (1965). This commitment makes eminently good sense where the employment rights being arbitrated are themselves the product of the contract; in effect, the substantive employment right was from its origin combined with a commitment to arbitrate, so that the individual upon whom the right was conferred has no basis for claiming that the substantive right should be enforceable in any other manner or fora. Precisely because of their origin, the contract rights subject to arbitral resolution also are collective rights, and it is accordingly the union, and not the individual, that controls access to the arbitration forum.

But where the collective agreement to arbitrate is understood to reach public law rights not rooted in the contract, quite different considerations come into play, as this Court emphasized in *Alexander v. Gardner-Denver, supra*:

> We are unable to accept the proposition that petitioner waived his cause of action under Title VII [by pursuing an arbitration remedy under the collective agreement.] . . . It is true, of course, that a union may waive certain statutory rights related to collective activity, such as the right to strike. These rights are conferred on employees collectively to foster the processes of bargaining and properly may be exercised or relinquished by the union as collective-bargaining agent to obtain economic benefits for union members. Title VII, on the other hand, stands on plainly different grounds; it concerns not majoritarian processes but an individual's right to equal employment opportunities . . . Of necessity, the rights conferred can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII. [415 U.S. at 51 (citations omitted).]

The same point was reiterated in *Gilmer v. Interstate/Johnson Lane Corp.,* —— U.S. ——, 111 S.Ct. 1647, 1657 (1992), where the Court concluded that a more sweeping policy in favor of arbitration that applies under the Federal Arbitration Act does *not* apply in the context of labor contract arbitration. The Court distinguished the FAA from the LMRA on the ground that labor arbitration is a collectively bargained system that functions to vindicate "rights under a collective bargaining agreement and [not] individual statutory rights," and in light of "the limited authority and power of labor arbitrators." *Id.* at 1657.

Consequently, while the presumption favoring arbitration of labor contract disputes is a broad one, it is not limitless; that presumption has force with regard to rights that are the fruits of the majoritarian decisionmaking process fostered by the collective bargaining system. It follows from this that when state courts resolve contract questions that arise in the course of considering independent state minimum labor standards law claims, they impinge upon no federal arbitration interest, so long as they apply the federal common law of labor contracts in resolving any ancillary labor contract question that may be implicated by the suit.

Were there any doubt on this point, it should be resolved by consideration of the fact that in analogous situations, it has never even been *suggested* that § 301 dictates arbitral resolution of labor contract questions that arise in the course of resolving claims based upon other public law sources. Thus in cases brought under Title VII, courts, including this Court, have regarded it as beyond question that the court, in the course of addressing the Title VII claim, is to resolve such labor contract questions as may arise. See, e.g., *Trans World Airlines v. Hardison,* 432 U.S. 63, 83 n.14 (1977) (considering seniority provision in labor agreement in evaluating anti-discrimination claim); *Goodman v. Lukens Steel Co.,* 482 U.S. 656, 668 n.13 (1987) (interpreting antidiscrimination clause in labor agreement). And in a case that provides the closest of analogies, *Corning Glass Works v. Brennan,* 417 U.S. 188, 209 n.29 (1974), the Court rejected an employer argument that the employer had corrected past violation of the Equal Pay Act, 29 U.S.C. § 206, through negotiation of certain provisions in a collective bargaining agreement, and the Court did so only after reviewing the district court's analysis of the relevant terms of the labor contract. There is once again no suggestion in this analysis that § 301 concerns made such interpretation problematic. *See also Connell Construction Co. v. Plumbers,* 421 U.S. 616, 623, 625 (1975) (interpreting a collective bargaining agreement to determine whether an agreement violated the Clayton Act).

Indeed, in another analogous area where there plainly *is* a federal labor law interest in having one adjudicator and not another decide a question, the Court has concluded that this interest is *not* strong enough to overcome a court's authority to resolve all issues in a case otherwise properly before it. In *San Diego Trades Council v. Garmon,* 359 U.S. 236 (1959), the Court formulated a powerful preemption doctrine that requires all disputes that even arguably involve claims of conduct protected by § 7 or prohibited by § 8 of the Act to be resolved by the National Labor Relations Board. Notwithstanding the

primary jurisdiction of the NLRB to consider unfair labor practice allegations, this Court has ruled consistently that "the federal courts may decide labor law questions that emerge as collateral issues in suits brought under independent federal remedies." *Connell, supra,* 421 U.S. at 626 (considering an antitrust violation). *See also Smith v. Evening News Ass'n,* 371 U.S. 195 (1962); *Kaiser Steel v. Mullins,* 455 U.S. 72, 87 (1982). The Court's judgment has been that while the policy that unfair labor practice claims be decided by the Labor Board is important—and, indeed, is normally paramount—that policy has to bow to the policy favoring the rational handling of litigation in a court that has jurisdiction over the claim before it. Nothing suggests that § 301 embodies a stronger form of preemption than that stated in *Garmon.*

Nor can it be that these cases can be distinguished on the ground that they involve federal, rather than state, regulation. That argument was advanced and squarely rejected in *Metropolitan Life, supra*: "Nor has Congress ever seen fit to exclude unionized workers and employers from laws establishing federal minimal employment standards. *We see no reason to believe that for this purpose Congress intended state minimum labor standards to be treated differently from federal standards.*" 471 U.S. at 755 (emphasis added).

Finally, even if all of this were not so, and there *was* a federal interest in having all questions concerning a labor contract with an arbitration clause wherever the question arises resolved by an arbitrator, and that interest was stronger than the interest in having the NLRB resolve questions under the NLRA, to protect that interest by *abolishing* state law public rights whenever their resolution implicates a labor contract question is the most unreasonable of all imaginable results.

In all other situations in which it is imperative that a second forum decide a question that arises in the course adjudicating a case properly before the first forum, a doctrine of deferral or abstention has been developed, whereby the first forum holds the claim in abeyance while the

preferred forum considers the ancillary question.[13] Thus under the NLRA, the NLRB will in appropriate circumstances defer to labor arbitration, always with the understanding that deferral "is merely . . . a postponement of the use of the Board's process." *United Technologies,* 268 NLRB 557, 560 (1984). *See generally, Collyer Insulated Wire,* 192 NLRB 837 (1971). And under the doctrine of *Railroad Commissioner v. Pullman,* 312 U.S. 496 (1941), federal courts will at times abstain when presented with questions of state law, with the same understanding: that the doctrine involves only postponement, not loss, of federal jurisdiction. *England v. Louisiana State Board of Medical Examiners,* 375 U.S. 411 (1964).[14]

[13] At least one judge has suggested that deferral might be appropriate in this context. *See Jackson v. Conrail,* 717 F.2d 1045, 1060 (7th Cir. 1983) (dissenting) (proposing deferral rather than the total elimination of the claim because "it would be surprising if compulsory arbitration of contract disputes was intended to wipe out the employee's common law rights other than his right to enforce the very contracts that are subject to the scheme of compulsory arbitration."), *cert. denied,* 104 S.Ct. 1000 (1984). To our knowledge, no litigant in a state law minimum standard suit has ever even requested deferral. We suspect this is so because in truth, the concerns that have led litigants to allege § 301 preemption have everything to do with its potential to defeat the state law claim altogeher, and little or nothing to do with the concern that contract questions are being decided by judges rather than arbitrators.

If deferral ever were considered, only the contract issue would be an appropriate subject of deferral, since a labor arbitrator generally has no authority to resolve the other issues presented in state law minimum standard cases. *Cf. Hillsborough Tp. v. Cromwell,* 326 U.S. 620, 628 (1946) (abstention inappropriate if there is doubt about the adequacy of a means to determine the state law issue in state court).

[14] Having said that much, we hasten to add that we are skeptical of the need for deferral or abstention in this class of cases. In this case, where no one has suggested that there is a substantial contract interpretation question involved, and where there has been no request by any party to submit the question to arbitration, there is in any event no occasion to consider whether in some instances the benefits of having arbitrators resolve contract questions that arise in the course of resolving noncontractual claims

H. The sum of the matter is this. The statutory right to receive a paycheck on one's last workday is independent of any contractual right, though to be sure, it is of no effect unless there is a paycheck to give, that is, unless there has been an employment relationship, the employee has earned wages due, and the employer has terminated the employee. The essential point is that the "last paycheck" law does not draw its substance from any labor contract; the right is a public law right and has full force and effect whether the parties have negotiated such a rule or not. The fact that the right is stated in general terms and there may be disputes about the details of its application that call for reference to the understandings that govern the employment relationship does *not* make that public law right a private contract right. The state law here, moreover, is *not* one that creates an enhanced penalty for the employer's violation of a collective bargaining agreement; indeed nothing in the record below suggests that the labor contract has been violated or even that the employee claimed that there had been any such breach. The California wage law is thus an example of the most common and venerable state minimum standard law, a law of a kind that the states were enacting long before the passage of the National Labor Relations Act, and that has heretofore always been understood to have survived the enactment of the National Labor Relations Act and the Labor Management Relations Act.

II. SECTION 229 AS APPLIED BY THE LABOR COMMISSIONER IS PREEMPTED BY THE NATIONAL LABOR RELATIONS ACT.

Respondent incorrectly understood federal law to require California to exclude most unionized workers from the protections of its wage laws. The ultimate question presented in this case is whether such state action which

outweigh the cost and delay inherent in any system of deferral. It is enough to note respondent's decision simply to deprive petitioner of a right altogether because its resolution requires contract interpretation—a decision made as well by many federal courts in this context—under the guise of protecting "contract interpretation," makes no sense at all.

discriminates against the beneficiaries of the federal scheme of collective bargaining is contrary to federal law.

A. While it is not wholly distinct, this question does not fit squarely within any of the well-developed doctrines of federal labor preemption. This case is not in the class of cases involving the exclusive primary jurisdiction of the NLRB to resolve unfair labor practice charges. *San Diego Building and Construction Trades v. Garmon,* 359 U.S. 236 (1959). Neither is it precisely in the class of cases that take their name from *Machinists v. Wisconsin Employment Relations Commission,* 427 U.S. 132, 140 (1976), *viz.,* the class covering the state regulation of conduct that was meant to be unregulated because left "to be controlled by the free play of economic forces." Although it bears important similarities to the *Machinist's* class of cases, it is not in that class because, as we have just seen, the area of minimum labor standards regulation is not a "no law" area, but an area in which federal law leaves the states free to regulate.

Analysis must then begin with the first principle of preemption, grounded in the Supremacy Clause of the Constitution: that federal law is supreme, and state law that conflicts with or frustrates federal law must give way. *McCulloch v. Maryland,* 4 Wheat. 316, 436 (1819). That principle is the acknowledged starting point for all labor law preemption analysis. *See, e.g., Building and Construction Trades Council v. Associated Builders and Contractors,* 113 S.Ct. 1190, 1195 (1993) (citing cases).

Application of that principle requires consideration of whether there is indeed a federal interest burdened by operation of the state law. The easiest case in this regard is a case in which a state has penalized an employee for exercising an individual right explicitly guaranteed by federal law. In *Nash v. Florida Industrial Commission,* 389 U.S. 235 (1967), for example, the Court had no difficulty in finding Florida's decision to withhold benefits from an employee solely because she filed an unfair labor

practice charge to be an impermissible burden on that federally created right.

The instant case is like *Nash* in that the respondent directly discriminates against individuals covered by labor contracts containing arbitration clauses; it is different in that there is no individual right to be covered by such an agreement, but rather such agreements are the intended consequence of the operation of the collective right to bargain. But that difference is not determinative; for the *Machinists* line of cases protects just such implicit NLRA collective rights—*viz.* the rights of organized employees and of employers not to be subject to state laws that encroach upon the federal scheme's "no law" area. That being so, this case involves the same mode of analysis that animates the *Machinist* line of cases: whether the state law burdens the operation of the federal scheme taken as a whole.

Preemption based upon concerns implied but not expressed in federal law requires a searching scrutiny of the nature of the federal interest. As the Court stressed in *Belknap v. Hale,* 463 U.S. 491 (1983), to overcome the presumptive validity of state law, more is needed than "broad brush assertions" of burdens on federal rights. *Id.* at 501. We nevertheless believe that analysis of the federal interest here can lead to no conclusion other than that this law, like the law in *Machinists,* is a law that is contrary to the federal scheme.

B. The NLRA does not guarantee employees the right to be covered by labor contracts, or indeed, any guarantee of any contractual rights at all. But, as we have stressed, the entire purpose of the Act is to create a *process* through which such agreements may be reached. The state law here in dispute is a law that discriminates against members of a group that have successfully completed the process of collective bargaining provided for by the federal labor laws. It is difficult to imagine a more direct burden on the federal scheme. As the Court noted in *Metropolitan Life,* "It would turn the policy that animated the Wagner Act on its head to understand it to

have penalized workers who have chosen to join a union by preventing them from benefiting from state labor regulations imposing minimal standards on nonunion employers." 471 U.S. at 756.

C. We hasten to add that the states should, in enacting their laws, take care not to encroach upon areas of exclusive federal concern. But such laws must be based upon *reasonable* concerns about encroaching on the federal scheme, and must in every instance be judged as well by the effect the regulation has on federally protected rights.[15] Here, where the concern about § 301 preemption is fundamentally misconceived, and where the effect of that misconception is to burden directly the operation of the federal collective bargaining law, respondent is in no position to argue that its misunderstanding of the federal law justifies the burdens it has placed on collective bargaining. Whatever power respondent has to write exclusions into its laws in reliance upon the "penumbra" cast by the preemptive force of the federal labor law does not justify excluding unionized workers from the most basic and longstanding minimum standard laws that orbit well outside of that half-light.

By the same token, the states may make accommodations to collective bargaining in their minimum standards laws. In *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1052 (1987), for example, the Court considered a statute that allows all employers, including unionized employers, to bargain for an alternative to a state minimum standard law. The Court rejected an argument that the law was

[15] Thus in *Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608 (1986), a municipality argued that its refusal to renew the license of a business engaged in a labor dispute was grounded on a desire to remain neutral in that dispute, a desire the municipality believed to be in conformity with federal labor law. Los Angeles further argued that to judge such a position to be itself preempted by federal labor law was to place the municipality in a "no win situation," since whatever action it took it would "stand accused" of aiding one side or the other in the dispute. *Id.* at 619. The Court, finding this argument to be based on a misunderstanding of the relevant federal interests, dismissed it out of hand. *Id.*

preempted as it applied to unionized employers. It found, to the contrary, the opt-out "strengthens the case that the statute works no intrusion on collective bargaining [because it] balance[s] the desirability of a particular substantive labor standard against the right of self-determination regarding the terms and conditions of employment." *Id.* at 22.[16]

The courts have just begun to consider preemption challenges raised in relation to state minimum standard laws that distinguish between unionized and nonunionized workplaces. We doubt that in this case of first impression it will be possible or prudent to devise a rule intended to be responsive to every possible permutation that may arise. This is especially so when the governing principle requires a careful parsing of the interests involved in each case. As in other preemption cases, then, "[t]his penumbral area can be rendered progressively clear only by the course of litigation." *Weber v. Anheuser-Busch*, 348 U.S. 468, 480-481 (1955).

For present purposes it is enough to note that as applied, Cal. Code § 229 has not been and cannot be defended on this or any other similar ground. The provision does *not* allow unionized workers collectively to decide to opt out of California's wage laws in preference to some other collectively bargained arrangement; it simply excludes them, thereby putting them to a Hobson's choice whereby bargaining for a labor contract with an arbitration clause costs them a substantive public law protection that otherwise is vouchsafed to all other employees as a matter of right. Nor does the state provision further a state interest that parallels a federal labor law interest by increasing the security or well being of workers in some manner;

[16] By a parity of reasoning, a nuanced state law that allows unionized workers collectively to opt out of a state minimum standard law if they bargain for similar but not necessarily identical protections, *compare Babler Bros., Inc. v. Roberts*, 995 F.2d 911 (9th Cir. 1993), raises different concerns than those raised here. On analysis a court might conclude that such a law facilitates collective bargaining rather than punishes its exercise.

instead it bluntly discriminates against those who have successfully completed the bargaining process created and encouraged by federal law. Whatever may be said in defense of other laws designed to accommodate the state and federal schemes, this law should be preempted.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

MARK SCHNEIDER
9000 Machinists Place
Upper Marlboro, Maryland 20772

MARSHA S. BERZON
177 Post Street, Suite 300
San Francisco, California 94108

LAURENCE GOLD
(Counsel of Record)
WALTER KAMIAT
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390